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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 6159

DATE COMPLAINT FILED: January 15, 2009

DATE OF NOTIFICATION: January 23, 2009

DATE OF LAST RESPONSE: May 13, 2009

DATE ACTIVATED: May 26, 2009

STATUTE OF LIMITATIONS: June 30—July 2, 2013

COMPLAINANTS:

National Right to Work Legal Defense and Education
Foundation, Inc.

Claire Waites

Jeanne Fox

RESPONDENTS:

Baldwin County Education Association

Saadia Hunter, BCEA President

Alabama Education Association

National Education Association

National Education Association Fund for Children
and Public Education

RELEVANT STATUTES:

2 U.S.C. § 441b(a)

2 U.S.C. § 441b(b)(3)

2 U.S.C. § 441f

11 C.F.R. § 100.5(g)(3)

11 C.F.R. § 102.6(b)(1)

11 C.F.R. § 110.3(a)(2)

11 C.F.R. § 110.4

11 C.F.R. § 114.5

11 C.F.R. § 300.2(b)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

none

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I. INTRODUCTION

Complainants allege that affiliated labor organizations solicited involuntary contributions for their separated segregated fund ("SSF") during the 2008 election cycle. The complaint also alleges that an agent of the labor organizations failed to inform the two individual complainants, Claire Waites and Jeanne Fox, of the political purposes of the fund and of their right to refuse to contribute without reprisal at the time of solicitation, in violation of 2 U.S.C. § 441b(b)(3). The complaint further alleges that: A) one of the labor organizations used its treasury funds to make contributions in violation of 2 U.S.C. § 441b(a) and 2 U.S.C. § 441b(b)(3)(A); and B) three respondents made, and one respondent accepted, contributions in the name of Ms. Waites and Dr. Fox in violation of 2 U.S.C. § 441f. Based on the information in the complaint and responses, we recommend the Commission dismiss the allegations and close the file.

II. FACTUAL SUMMARY

The National Education Association ("NEA") is a nationwide labor organization with more than 3.2 million members, the majority of whom are employed by public school districts, colleges, and universities. AEA/NEA/NEA Fund Response at 1. The National Education Association Fund for Children and Public Education ("NEA Fund") is its federally registered SSF. *Id.* The Alabama Education Association ("AEA") is the NEA's state affiliate in Alabama. *Id.* The Baldwin County Education Association ("BCEA") is a local union that represents teachers employed by the Baldwin County (Alabama) Public Schools. BCEA Response at 1. Saadia Hunter was the President of BCEA at the time the events relevant to the complaint occurred. AEA/NEA/NEA Fund Response at 1. BCEA is affiliated with AEA and NEA. *Id.* The complainants are National Right to Work Legal Defense and Education Foundation, Inc., and Claire Waites and Jeanne Fox, two members of all three affiliated labor organizations.

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1 Complaint at Paragraphs 1-3. Ms. Hunter, Dr. Fox, and Ms. Waites provided declarations and
2 affidavits, as did Tiffeny Howard and Kim Williams, two members of the BCEA who also
3 attended the NEA convention as delegates and claim to have witnessed some of the events in
4 question.

5 The complaint's allegations relate to events at the NEA's June 30 – July 2, 2008, national
6 convention in Washington D.C., which Fox, Waites, Hunter, Williams, and Howard attended as
7 delegates. The NEA refers to this convention as its Representative Assembly ("RA").

8 Complaint at Paragraph 9. Prior to the RA, the BCEA approved a budget that included funds to
9 pay costs for their delegates to attend the NEA RA, including travel, hotel, meals, and
10 incidentals. BCEA Response at 1-2. BCEA allocated a total of \$1,960 for each of the nine
11 delegates attending the 2008 NEA RA. "Pursuant to the BCEA's convention expense
12 procedures, Ms. Waites and Ms. Fox received \$1,568 (80% of the per person travel allocation)
13 before the NEA convention for the purpose of purchasing their airfare in advance and reserving
14 their hotel rooms." BCEA Response at 2. Ms. Hunter was responsible for bringing with her to
15 the convention the remaining 20% per person travel allocation balance for the delegates. "She
16 had nine envelopes marked with each delegate's name containing \$392 in cash (20% of the per
17 person travel allocation). She distributed these funds to each BCEA delegate during the NEA
18 convention." BCEA Response at 3.

19 According to declarations from Tiffeny Howard and Kim Williams, the AEA State
20 Captain made a verbal solicitation for contributions to the NEA Fund on June 30, 2008, at the
21 end of an AEA meeting at the RA. Howard Declaration at Paragraph 4; Williams Declaration at
22 Paragraph 4. According to Ms. Hunter and Ms. Williams, Dr. Fox crossed paths with
23 Ms. Hunter and Ms. Williams as they were on the way to the line of people making contributions

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1 to the NEA Fund. Hunter Declaration at Paragraph 7; Williams Declaration at Paragraph 6.
2 Their declarations continue by saying that Dr. Fox indicated "that she left her purse in her room."
3 *Id.* Ms. Hunter states that she then asked Dr. Fox if she would like Ms. Hunter to make a
4 contribution on her behalf because Ms. Hunter still had the envelope containing Dr. Fox's
5 stipend money in her purse. Hunter Declaration at Paragraph 7. Ms. Hunter recounts that
6 Dr. Fox agreed to let Ms. Hunter submit the contribution on behalf of Dr. Fox, left the room, and
7 came back shortly thereafter and instructed Ms. Hunter to submit a contribution for Ms. Waites
8 also. Hunter Declaration at 9. Dr. Fox was a good friend of Ms. Waites, and they shared a hotel
9 room during the convention. Hunter Declaration at 9. Ms. Williams asserts that she, too, heard
10 Dr. Fox tell Ms. Hunter to submit a contribution on Ms. Waites' behalf. Williams Declaration at
11 Paragraph 8. Ms. Hunter states that despite having envelopes with the BCEA stipends in them to
12 be distributed to each of the BCEA delegates, she only submitted contributions for herself,
13 Ms. Howard (who gave Ms. Hunter \$100 cash to use as her contribution), Dr. Fox, and
14 Ms. Waites, whose contribution she believed had been authorized by Dr. Fox. Hunter
15 Declaration at Paragraph 14.¹

16 Dr. Fox asserts that she "was told by BCEA President Saadia Hunter that we were
17 required to make a \$100.00 contribution that day to the political action committee (PAC) of the
18 NEA." Fox Affidavit at Paragraph 4. However, in apparent contradiction, Dr. Fox states that
19 she "agreed to" make a \$100 contribution to the NEA Fund, based on the belief that the money
20 was not going to a political campaign. Fox Affidavit at Paragraph 7. Dr. Fox claims that she

¹ Upon attempting to submit the contributions, the Alabama State Captain advised Ms. Hunter that the cash contribution limit was \$100 but there was not a similar \$100 limitation on contributions by personal check. Hunter Response at page 4; Williams Declaration at Paragraphs 9-10. The Frequently Asked Questions for the 2008 NEA RA indicate that contributors may give up to \$100 in cash; any additional contributions at the RA had to be made by personal check, credit card, travelers check, or money order. Exhibit I to AEA/NEA/NEA Fund Response. The 2008 goal set for individual delegate contributions at the RA was \$180. AEA/NEA/NEA Fund Response at 2.

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1 “did not think the money was going to any political campaign...Instead, I thought I was giving to
2 a children’s education fund.”² Fox Affidavit at Paragraph 7. Ms. Hunter asserts in her response
3 that she “was not an authorized agent of the NEA Fund and she did not solicit contributions on
4 behalf of the political committee.” Hunter Response at 8.

5 According to the complaint, Ms. Hunter had already submitted the contributions to the
6 NEA Fund by the time Ms. Waites arrived at the NEA RA. Complaint at Paragraph 11.
7 According to Ms. Waites’ affidavit, she first learned of the contribution to the NEA Fund in her
8 name the next day when she and Dr. Fox had a phone conversation with Ms. Hunter. Waites
9 Affidavit at Paragraph 9. Ms. Waites states in her affidavit that “John Hudson, an employee of
10 the AEA, told me that the BCEA included the NEA PAC contribution in the expense
11 reimbursement of every BCEA delegate.” Waites Affidavit at Paragraph 12. Ms. Waites
12 provides no information as to the date of this discussion. In contrast to Ms. Waites’ assertions,
13 Mr. Hudson states in his declaration that he “was on vacation from June 27 to July 6, 2008 and
14 did not attend the NEA Representative Assembly (“RA”) held in Washington, D.C. during that
15 period.” Hudson Declaration at Paragraph 3. Further, Mr. Hudson states that while he received
16 a voice message from Ms. Waites and attempted to contact her by both phone call and letter, he
17 has “never spoken to Ms. Waites about her allegations concerning her contribution to the NEA
18 Fund at the 2008 RA.” Hudson Declaration at Paragraph 9. Mr. Hudson also states that he has
19 “been employed by the Alabama Education Association (“AEA”) since January, 1998” and
20 performs “administrative and other support services for local unions affiliated with the AEA who

² It is worth noting that Ms. Waites stated that she knew from the 2004 convention that the NEA Fund was a political committee, not a “children’s fund.” Waites Declaration at Paragraphs 7-9. It appears to be undisputed that the AEA State Captain made a verbal solicitation at the June 30 caucus. However, Ms. Waites did not attend this caucus and, therefore, did not hear the solicitation. Dr. Fox did attend the caucus.

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1 represent employees in the Baldwin County public school district.” Hudson Declaration at

2 Paragraph 2. As such, he stated he was

3 quite certain that I never would have said what the complaint
4 attributes to me. I am well aware that union dues money may not
5 be used for contributions to the NEA Fund. Moreover, it has been
6 my understanding that the stipends provided to the delegates to
7 cover their travel and other expenses at the RA belong to the
8 delegates who may use them as they choose; as far as I am aware,
9 they are not union funds.

10
11 Hudson Declaration at Paragraph 11.

12 Ms. Waites says in her affidavit that she later told AEA president Peggy Mobley that she
13 “wanted *my* money back.” Waites Affidavit at Paragraph 10 (emphasis added). Dr. Fox states
14 that she and Ms. Waites “confronted” Ms. Mobley about their contributions not going to a
15 “children’s education charity,” and that Ms. Mobley was “rude” to Ms. Waites “in front of many
16 other delegates” in response. Fox Affidavit at Paragraph 8. Consistent with Ms. Waites’
17 statement in her affidavit, Ms. Hunter alleges in her statement that Ms. Waites left a voice mail
18 message that said to the best of her recollection: “this is Claire. Do not spend *my* money. You
19 have no right spending *my* money. I don’t want *my* money going to Obama.” Hunter
20 Declaration at Paragraph 17 (emphasis added). Further, according to Ms. Hunter, Dr. Fox
21 instructed Ms. Hunter to use a portion of the money in Dr. Fox’s envelope to reimburse
22 Ms. Waites, presumably because Dr. Fox wanted to make amends for her error in telling
23 Ms. Hunter to submit a contribution using Ms. Waites’ money on Waites’ behalf. Hunter
24 Declaration at Paragraph 21. This envelope is the same one from which Fox allegedly
25 authorized Hunter to submit a contribution the day before. Ms. Hunter and Dr. Fox used funds
26 from their envelopes, with Dr. Fox giving \$80 and Ms. Hunter giving \$20, to return to
27 Ms. Waites. *Id.* Ms. Waites states that, on the last day of the NEA RA, she received \$100 from

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Ms. Hunter to replace the contribution that was submitted on Ms. Waites' behalf, but she returned the money when she learned it was not a refund from the AEA. Waites Affidavit at Paragraph 14. According to Ms. Waites, the \$100 contribution submitted in her name has not been refunded by AEA. Waites Affidavit at Paragraph 14.

III. ANALYSIS

A. Count I: BCEA violated 2 U.S.C. §§ 441b(a) and 441b(b)(3)(A) by making a contribution to the NEA Fund.³

Based on their allegation that "BCEA included in the expense reimbursements for its delegates to the NEA RA an amount to cover the delegates' contributions" to the NEA Fund, the complainants contend that Ms. Hunter used union money to submit the contributions on behalf of Ms. Fox and Ms. Waites, in purported violation of 2 U.S.C. § 441b(a), which prohibits labor unions from making a contribution or an expenditure in connection with any election for federal office.⁴ Complaint at Paragraph 23. However, Ms. Waites says in her affidavit that she told AEA president Peggy Mobley that she "wanted *my* money back." Waites Affidavit at Paragraph 10 (emphasis added). Consistent with Ms. Waites' statement in her affidavit, Ms. Hunter alleges in her statement that Ms. Waites left a voice mail message that said to the best of her recollection: "this is Claire. Do not spend *my* money. You have no right spending *my* money. I don't want *my* money going to Obama." Hunter Declaration at Paragraph 17 (emphasis added).

³ The complaint alleges that BCEA violated 2 U.S.C. § 441b(b)(3)(A). With respect to making contributions, that provision focuses on the separate segregated fund, such as NEA Fund. NEA Fund is a component of NEA. AEA and BCEA are affiliated and connected organizations of NEA. Therefore, the actions of NEA Fund could reflect on NEA or its affiliated and connected organizations, BCEA and AEA, and vice versa. Nevertheless, because Count I of the Complaint focuses on the actions of BCEA in allegedly making a contribution, we confine our analysis in this Count to the allegations of a potential violation of 2 U.S.C. § 441b(a), and not on any potential violation of NEA Fund.

⁴ Ms. Waites also seems to allege that similar activity occurred during the 2004 NEA RA. Waites Affidavit at Paragraphs 4-8. However, these allegations were not referenced formally as one of the counts in the complaint. Furthermore, the penalties for these allegations would now be time-barred by the five-year statute of limitations as the 2004 convention was held July 2-7.

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1 The Respondents argue that the stipends given to Ms. Waites and Dr. Fox belonged to the
2 delegates, and it was the delegates' own voluntary decision whether to use the stipend money to
3 make contributions and in what amount. BCEA contends that the "travel funds belonged to the
4 delegates who attended the NEA convention. If a delegate chose to use such funds to make a
5 contribution to NEA's PAC, it was his or her decision to use the funds for that purpose, not the
6 decision of BCEA." BCEA Response at 3. BCEA also states that delegates "are required to
7 account for their expenses and are informed that Internal Revenue Service regulations require
8 that any monies in excess of \$600 not accounted for must be reported as miscellaneous personal
9 income by the delegate." BCEA Response at 2. Because a "person may use their personal funds
10 for any purpose, including making a contribution," BCEA contends that the Federal Election
11 Campaign Act of 1971, as amended ("the Act") was not violated with respect to this Count.
12 BCEA Response at 4.

13 Ms. Hunter states in her declaration that despite having the envelopes with the BCEA
14 stipends in them to be distributed to all of the BCEA delegates, she only submitted contributions
15 for herself, Ms. Howard (who gave Ms. Hunter \$100 cash to use as her contribution), Dr. Fox,
16 and Ms. Waites, whose contribution she believed had been authorized by Dr. Fox. Hunter
17 Declaration at Paragraph 14. This statement appears to be consistent with the Respondents'
18 position, because if the funds were union funds intended for contributions, Ms. Hunter would
19 have submitted contributions on behalf of all of the other BCEA delegates using the stipend
20 money she had with her. Further, according to Ms. Hunter, Dr. Fox instructed Ms. Hunter to use
21 a portion of the money in Dr. Fox's envelope to reimburse Ms. Waites, presumably because
22 Dr. Fox wanted to make amends for her error in telling Ms. Hunter to submit a contribution
23 using Ms. Waites' money on Waites' behalf. Hunter Declaration at Paragraph 21. This envelope

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1 is the same one from which Fox allegedly authorized Hunter to submit a contribution the day
2 before. Consistent with the responses, if the money had been union funds, instead of Dr. Fox's
3 personal funds, Dr. Fox would have had neither authority nor need to tell Ms. Hunter to use the
4 money in this manner.

5 As mentioned earlier, the Act prohibits labor unions from making "a contribution or an
6 expenditure in connection with any election for federal office." 2 U.S.C. § 441b(a). All parties
7 agree that Ms. Hunter physically submitted the contributions of Jeanne Fox and Claire Waites to
8 the NEA Fund using the money Ms. Hunter was holding on behalf of these two BCEA delegates,
9 although there is significant disagreement among the parties over whether Dr. Fox gave
10 Ms. Hunter authority to do so.

11 Even so, the information provided appears to indicate that the money used by Ms. Hunter
12 to submit contributions in the names of Ms. Waites and Dr. Fox was their money; it belonged to
13 those two delegates and was being held on their behalf by Ms. Hunter. *See* Waites' affidavit and
14 Hunter declaration (referring to the funds as "my money"). It appears that the money was no
15 longer BCEA's money once it was given to Ms. Hunter to distribute to the delegates; on the
16 contrary, it was money being held by BCEA's then-president for its members. Further, there is
17 no indication of any expectation or contemplation on the part of NEA, AEA, or BCEA that the
18 stipend money would be used for political contributions. Nonetheless, there is a conflict between
19 the parties' declarations and affidavits as noted above, and we do not believe it would be the
20 most efficient use of the Commission's resources to resolve these allegations given the small
21 amount at issue. Therefore, we recommend the Commission dismiss the allegation that BCEA
22 violated 2 U.S.C. § 441b(a).

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B. Count II: Saadia Hunter, BCEA, AEA, and NEA Fund violated 2 U.S.C. § 441b(b)(3)(B) by failing to inform Ms. Waites and Dr. Fox of the political purposes of the fund at the time of the solicitation.

The complaint also alleges that Ms. Hunter was soliciting contributions for the NEA Fund, was an agent for the BCEA and the NEA Fund, and told Ms. Waites and Dr. Fox in violation of 2 U.S.C. § 441b(b)(3)(B) that contributions to the NEA Fund were not political contributions, but contributions to a “children’s fund.” Complaint at Paragraph 24. The complaint alleges that AEA encouraged and expected Ms. Hunter to solicit contributions to the NEA Fund, in violation of 2 U.S.C. § 441b(b)(3)(B), without informing Ms. Hunter that the NEA Fund was a political committee and the contributions were for political purposes rather than contributions to a “children’s fund.” Complaint at Paragraph 25. *See also* 11 C.F.R. § 114.5(a)(3). According to the complaint, Ms. Hunter had already submitted the contributions to the NEA Fund by the time Ms. Waites arrived. Complaint at Paragraph 11. Therefore, it is not apparent how or when any alleged solicitation to Ms. Waites by Ms. Hunter could have taken place.

In their response, the NEA and AEA assert that Ms. Hunter is not an agent of their organizations and, therefore, had no authority to solicit on their behalf. AEA/NEA/NEA Fund Response at 6. Ms. Hunter also asserts in her response that she “was not an authorized agent of the NEA Fund and she did not solicit contributions on behalf of the political committee.” Hunter Response at 8.

Local, state, or national chapters of unions are affiliated with each other and may serve as collecting agents for the national organization’s SSF. 11 C.F.R. §§ 100.5(g)(3)(ii) and (iii), 110.3(a)(2)(iii), 102.6(b)(1)(ii) and (iii). Therefore, BCEA, AEA, and NEA could all serve as collecting agents for NEA Fund. As its president, Ms. Hunter was an agent for BCEA, an

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1 affiliated union of both AEA and NEA. Because Ms. Hunter was an agent of BCEA, which is a
2 local union affiliate and potential collecting agent for NEA, she could solicit on its behalf for
3 contributions to the NEA Fund. Nevertheless, even assuming the facts as stated by the
4 complainants, Ms. Hunter could not have solicited funds from Ms. Waites because the
5 contribution had been submitted before Ms. Waites arrived.⁵

6 With respect to Dr. Fox's contribution, the facts are unclear. Dr. Fox states that
7 Ms. Hunter told her that she was required to make two contributions on two different days to the
8 NEA Fund, totaling \$180. Fox Affidavit at Paragraph 4. According to Ms. Hunter and
9 Ms. Williams, Dr. Fox crossed paths with Ms. Hunter and Ms. Williams as they were on the way
10 to the line of people making contributions to the NEA Fund. Hunter Declaration at Paragraph 7;
11 Williams Declaration at Paragraph 6. Their declarations continue by saying that Dr. Fox
12 indicated "that she left her purse in her room." *Id.* Ms. Hunter states that she then asked Dr. Fox
13 if she would like Ms. Hunter to make a contribution on her behalf because Ms. Hunter still had
14 the envelope containing Dr. Fox's stipend money in her purse. Hunter Declaration at Paragraph
15 7. Arguably, that query may have constituted a solicitation, but it seems more likely that it was a
16 spur-of-the-moment discussion of logistics. Further, it is unclear whether the AEA State
17 Captain, who did solicit on behalf of the NEA Fund, informed the delegates present of the
18 political purposes of the fund at the time of the solicitation. However, due to the *de minimis*
19 amount at issue here, we believe it would not be an efficient use of the Commission's resources
20 to investigate these allegations. Therefore, we recommend the Commission dismiss the
21 allegations that Saadia Hunter, BCEA, AEA or NEA violated 2 U.S.C. § 441b(b)(3)(B) by

⁵ Further, Ms. Waites admits she knew the NEA Fund had a political purpose. *See* footnote 2.

1 failing to inform Dr. Fox and Ms. Waites of the political purposes of the NEA Fund at the time
2 of the solicitation.

3 **C. Count III: Saadia Hunter, BCEA, AEA and NEA Fund violated**
4 **2 U.S.C. § 441b(b)(3)(C) by not informing Ms. Waites and Dr. Fox of**
5 **their right to refuse to contribute without any reprisal.⁶**
6

7 The complaint next alleges that Ms. Hunter solicited money for the NEA Fund without
8 informing Ms. Waites or Dr. Fox of their right to refuse to contribute without any reprisal in
9 violation of 2 U.S.C. § 441b(b)(3)(C). *See also* 11 C.F.R. § 114.5(a)(4). The complainants
10 believe this alleged failure to inform "was the result of instructions given by agents of the AEA
11 who not only failed to provide this information, they instructed local affiliate officers that the
12 contributions should be given in a specific amount and in two separate payments."⁷ Complaint
13 at Paragraph 26. As a rebuttal, the Respondents point to several documents, including a
14 publication sent before the NEA RA to all delegates, a statement given to each delegate at
15 registration, and the AEA enrollment forms, which all indicate that "members have the right to
16 refuse to contribute without suffering any reprisal." Exhibits A-C to AEA/NEA/NEA Fund
17 Response.

18 In order to ensure that contributions solicited for a separate segregated fund are
19 voluntary, a solicitation for contributions, whether written or oral, must inform the employee or
20 member being solicited at the time of the solicitation of his or her right to refuse to so contribute
21 without any reprisal. *See* 2 U.S.C. § 441b(b)(3)(C); 11 C.F.R. § 114.5(a)(3)–(5); *see also*,

⁶ Count III in the complaint refers to 2 U.S.C. § 441b(b)(3)(B). However, the correct provision is 2 U.S.C. § 441b(b)(3)(C) and we regard the incorrect citation as a typographical error.

⁷ It does not appear that separate payments were required. For example, Ms. Hunter made a single \$180 contribution to the NEA Fund with a personal check. Hunter Declaration at Paragraph 10. However, because there was a \$100 cash contribution limit, those who wished to meet the 2008 RA goal of \$180 by, in part, contributing \$100 cash would have to make an additional payment by personal check, money order, credit card, or travelers check.

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1 MUR 5681 (High Point) (Commission assessed a statutory penalty of \$5,500 for the violation of
2 441b(b)(3) and 114.5(a)(2)-(5) where a trade association's political committee violated these
3 requirements); MUR 5337 (First Consumers National Bank) (Conciliation Agreement sets forth
4 that solicitations that do not meet the proper notice requirements of 11 C.F.R. § 114.5 can be
5 coercive); MUR 5208 (Amboy National Bank) (Commission assessed a civil penalty of 50% of
6 the contributions that a political committee received in response to a solicitation that violated
7 2 U.S.C. § 441b(b)(3)(B)-(C) and 11 C.F.R. 114.5 §§ (a)(2)-(5)). When AEA, as an affiliate and
8 potential collecting agent for the NEA Fund, made a solicitation, it had a responsibility to inform
9 its members that contributions were voluntary, that making a contribution was not a condition of
10 employment nor membership in the Association, that members had the right to refuse to make
11 any contribution, that the \$180 goal was only a suggestion or guideline, and that the labor
12 organization would not favor or disadvantage anyone by reason of the amount of the contribution
13 or the failure to contribute. *See* 11 C.F.R. § 114.5(a).

14 As discussed in Count II, *supra*, it is not clear when any of the connected organizations or
15 its affiliates failed to tell Ms. Waites about her right to refuse to contribute without reprisal
16 because Ms. Waites admits that the contribution was submitted on her behalf before Ms. Waites
17 arrived. Further, even assuming the facts as stated by the complainants, no one could have
18 solicited funds from Ms. Waites because the contribution had been submitted before Ms. Waites
19 arrived. With respect to Dr. Fox, it is unclear whether the AEA State Captain, when making her
20 solicitation for the NEA Fund, informed the delegates present of their right to refuse to
21 contribute without reprisal, that contributions were voluntary, that making a contribution was not
22 a condition of employment nor membership in the Association, that members had the right to
23 refuse to make any contribution, that the \$180 goal was only a suggestion or guideline, and that

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1 the labor organization would not favor or disadvantage anyone by reason of the amount of the
2 contribution or the failure to contribute. Also as discussed in Count II, *supra*, it is unclear
3 whether Ms. Hunter solicited Dr. Fox but, if she did, it appears that Ms. Hunter did not inform
4 Dr. Fox of her right to refuse to contribute without reprisal. Nevertheless, due to the *de minimis*
5 amount at issue here, we believe it would not be an efficient use of the Commission's resources
6 to investigate these allegations and resolve these issues. Therefore, we recommend the
7 Commission dismiss the allegation that Saadia Hunter, BCEA, AEA or the NEA Fund violated
8 2 U.S.C. § 441b(3)(C).⁸

9 **D. Count IV: Ms. Hunter, BCEA, and AEA made, and the NEA Fund accepted,**
10 **contributions to the NEA Fund in the names of Ms. Waites and**
11 **Dr. Fox without their permission in violation of 2 U.S.C. § 441f.**
12

13 In the last Count, the complaint alleges that Ms. Hunter made a contribution to the NEA
14 Fund in the names of Ms. Waites and Dr. Fox without their prior permission in violation of
15 2 U.S.C. § 441f, which specifically prohibits campaign contributions made in the name of
16 another person. According to Ms. Waites' affidavit, she first learned of the contribution to the
17 NEA Fund in her name the next day when she and Dr. Fox had a phone conversation with
18 Ms. Hunter. Waites Affidavit at Paragraph 9.

⁸ We note that both Dr. Fox and Ms. Waites state in their affidavits that they were confronted by negative behavior during the convention. Specifically, Dr. Fox states that she and Ms. Waites "confronted" AEA president Peggy Mobley about their contributions not going to a "children's education charity," and that Ms. Mobley was "rude" to Ms. Waites "in front of many other delegates" in response. Fox Declaration at Paragraph 8. Ms. Waites also states that AEA President Mobley treated her rudely and that she and Dr. Fox "were struck on the head by other delegates after we refused to wear the Obama shirts." Waites Declaration at Paragraph 13. The allegations of being struck by other delegates do not appear to be tied to the issue of contributions. There appear to be no allegations that those who allegedly struck Ms. Waites and Dr. Fox knew they had refused to make contributions to NEA Fund. We note parenthetically that, while we do not know whether it occurred on the same day that the Obama shirts were handed out, both Ms. Howard and Ms. Williams indicate that they "saw Claire Waites and Jeanne Fox wear McCain for President t-shirts at the July 2008 NEA convention in Washington, D.C." Howard Declaration at Paragraph 8; Williams Declaration at Paragraph 17. Because the allegations regarding other convention delegates appear to be based more on political events, we do not believe there is a sufficient nexus for these unfortunate events to be considered reprisal for Ms. Waites not making a contribution to the NEA Fund.

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1 The Act provides that no person shall make a contribution in the name of another person
2 or knowingly permit his or her name to be used to effect such a contribution, and that no person
3 shall knowingly accept a contribution made by one person in the name of another person.⁹

4 *See* 2 U.S.C. § 441f. The Commission's regulations provide some guidance as to the types of
5 activities the Commission regards as violations. *See* 11 C.F.R. § 110.4(b)(2)(i)-(ii). These
6 examples demonstrate that the Commission regulations seek to prevent deception or the attempt
7 to disguise the true source of money contributed. That type of activity does not appear to be at
8 issue here.

9 As stated previously, there is no dispute that Ms. Hunter submitted contributions to the
10 NEA Fund on behalf of herself, Ms. Waites, Dr. Fox, and Ms. Howard. Hunter Declaration at
11 Paragraphs 10-13; Howard Declaration at Paragraph 5; Waites Affidavit at Paragraph 9;
12 Complaint at paragraph 11. There is no dispute that the Alabama State Captain, when receiving
13 the contributions from Ms. Hunter, knew that the contributions were, in fact, for Ms. Waites,
14 Dr. Fox, Ms. Howard, and Ms. Hunter. There is also no dispute that an AEA representative was
15 aware that Ms. Waites wanted her contribution returned and that it was not returned by the AEA.
16 Waites Affidavit at Paragraph 13; Hunter Declaration at Paragraph 20. The total amount of the

⁹ On June 8, 2009, a federal district court judge in California dismissed criminal charges that Pierce O'Donnell violated section 441f by reimbursing conduit contributions to the 2004 presidential campaign of Senator John Edwards, ruling in part that Congress did not intend that provision to outlaw indirect contributions made through conduits. *U.S. v. O'Donnell*, C.D. Cal., Criminal No. 08-872. However, the *O'Donnell* court's order is unlikely to be upheld on appeal because (1) it mistakenly assumes Section 441f prohibits all conduit contributions, including those reported under Section 441a(a)(8); (2) its analysis that the statutory construction of Section 441f is inconsistent with other provisions of the Act that explicitly identify "direct or indirect" contributions fails to realize that all "contribution[s] in the name of another" are inherently indirect; and (3) it mischaracterizes the legislative history to support the conclusion that Section 441f does not prohibit the reimbursement of conduit contributions. *See* MUR 5818 (Feiger) General Counsel's Report #2 at 15; Memorandum re: Recommendation to Participate as Amicus Curiae in *United States v. O'Donnell*, No. 09-50296 (9th Cir.), dated July 21, 2009. On September 23, 2009, the Commission filed an amicus curiae brief urging the Ninth Circuit to reverse the *O'Donnell* decision. *See* MUR 5504 (Karoly) and MUR 5818 (Feiger) (recent Commission matters involving Section 441f violations).

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1 contribution submitted on behalf of Ms. Waites and not refunded is \$100. There is no
2 information that Dr. Fox requested a refund of her contribution.

3 We acknowledge that, if the money did belong to BCEA and not the delegates, it appears
4 that there would be a violation of 2 U.S.C. § 441f. However, the weight of the information
5 provided suggests that the money did not belong to BCEA. As explained above, it appears that
6 the money submitted by Ms. Hunter for Ms. Waites belonged to Ms. Waites and not the BCEA,
7 although that conclusion is not absolutely certain. Nonetheless, given the *de minimis* amount at
8 issue, we do not believe it would be an efficient use of the Commission's resources to resolve
9 these allegations. Therefore, we recommend the Commission dismiss the allegation that NEA
10 Fund violated 2 U.S.C. § 441f by accepting a contribution in the name of another. We further
11 recommend the Commission dismiss the allegation that BCEA violated 2 U.S.C. § 441f by
12 giving in the name of another. Finally, it appears, but is not absolutely clear, that Ms. Hunter
13 submitted contributions for Ms. Waites, Dr. Fox, and Ms. Howard under the impression that she
14 was authorized to do so by those persons. Therefore, we recommend the Commission dismiss
15 the allegation that Saadia Hunter violated 2 U.S.C. § 441f by giving in the name of another.

16 It does not appear that AEA violated 2 U.S.C. § 441f by not refunding the \$100
17 contribution to Ms. Waites even when it was made clear that the contribution had not been
18 authorized. Because it appears that the money belonged to Ms. Waites, and the AEA knew and
19 recorded the money as belonging to Ms. Waites at the time of the contribution, there appears to
20 be no violation of 2 U.S.C. § 441f. Nevertheless, because this contribution has never been
21 refunded, we are concerned that AEA may have disregarded its responsibilities as a collecting
22 agent for NEA Fund. However, in light of the *de minimis* amount of the violation and in
23 furtherance of the Commission's priorities and resources relative to other matters, we believe the

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1 most prudent course of action would be for the Commission to exercise its prosecutorial
2 discretion and dismiss the allegation that AEA violated 2 U.S.C. § 441f. *See Heckler v. Chaney*,
3 470 U.S. 821 (1985). It is troubling that AEA, after being advised that the contribution
4 submitted for Ms. Waites was unauthorized, did not refund her money. Nonetheless, there is no
5 statutory provision directly on point mandating the return of the contribution in this set of
6 circumstances.

7 **IV. RECOMMENDATIONS**

- 8
9 1. Dismiss the allegation that BCEA violated 2 U.S.C. § 441b(a);
10 2. Dismiss the allegation that Saadia Hunter, BCEA, AEA or the NEA Fund
11 violated 2 U.S.C. § 441b(b)(3)(B);
12 3. Dismiss the allegation that Saadia Hunter, BCEA, or the NEA Fund violated
13 2 U.S.C. § 441b(b)(3)(C);
14 4. Dismiss the allegation that BCEA, Saadia Hunter, or NEA Fund violated
15 2 U.S.C. § 441f;
16 5. Dismiss the allegation that AEA violated 2 U.S.C. § 441f;
17 6. Approve the appropriate letters;
18 7. Close the file.

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22 11/12/09
23 Date

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